2007

Paul Puttuck, Breakthrough Construction v. Peter Gendron, William Gendron : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

PAUL PUTTUCK, an individual and dba BREAKTHROUGH CONSTRUCTION,

Plaintiff/Appellant,

vs.

PETER GENDRON, WILLIAM GENDRON, and JOHN DOES 1-5,

Defendants/Appellees.

District Court No. 070500119

Appellate Court No. 20070731-CA

BRIEF OF APPELLEES

Appeal from the Third Judicial District Court,
Summit County, State of Utah
Judge Bruce C. Lubek Presiding

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LIST OF PARTIES

All parties involved in this appeal are identified in the caption.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

JURISDICTION

The Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES

Appellees (the "Gendrons") respectfully disagree with Appellant's ("Puttuck") statement of the issues. Instead of the numerous issues Puttuck identifies in his brief, the Gendrons contend there are only two issues in this case.

Issue No. 1: Does Puttuck's complaint state a claim for relief under Utah law? (Add. at 159.)

Standard of Review: "[A]n appellate court must accept the material allegations of the complaint as true" and will affirm the trial court's ruling "if it clearly appears the complainant can prove no set of facts in support of his or her claims." *Mackey v. Cannon*, 2000 UT App 36, ¶ 9, 996 P.2d 1081 (quotations and citation omitted). "The propriety of a trial court's decision to grant or deny a motion to dismiss under rule 12(b)(6) is a question of law that we review for correctness." *Id.* (quotations and citation omitted). *See also*, Utah R. Civ. P. 12(b)(6).

Issue No. 2: Did the district court judge abuse his discretion by denying Puttuck's request to amend his complaint? (Add. at 164.)

Standard of Review: "'We will not disturb a trial court's ruling on a motion to amend a complaint absent a clear abuse of discretion.'" *Holmes Development, LLC v. Cook*, 2002 UT 38, ¶ 56, 48 P.3d 895 (quoting *Neztsosie v. Meyer*, 883 P.2d 920, 922 (Utah 1994)).

GOVERNING LAW

There are no constitutional provisions, statutes, ordinances, rules or regulations determinative of or of central importance to the appeal.

STATEMENT OF THE CASE

A. *Nature of the Case, Course of Proceedings and Disposition Below*

The Gendrons agree with the procedural history recited in Puttuck's brief.

B. *Statement of Facts*

Peter Gendron, with others not parties to this action ("Owners"), hired Puttuck to construct a home in Park City, Utah. (Add. at 162-163.) The Owners terminated Puttuck before the home was finished and replaced him with John Hale. (Add. at 163.) Puttuck filed an action against the Owners to recover amounts allegedly owed on the project ("*Puttuck I*"). (Add. at 163.) Only one of the Owners, LRG, Inc., asserted counterclaims against Puttuck for cost overruns. (Add. at 49-66, 163; Puttuck Brief at xiii.) The parties settled all claims in that case and it was dismissed with prejudice. (Add. at 34-35, 163.) Hale subsequently filed an action against the Gendrons and LRG, Inc. ("*Hale*"), which was resolved by a jury. (Add. at 83-105, 163.)

Following the termination of both cases, Puttuck filed the complaint that is the subject of this appeal. He asserted five causes of action against the Gendrons: 1) wrongful use of civil proceedings; 2) civil perjury; 3) obstruction of justice; 4) abuse of process; and 5) civil conspiracy. (Add. at 5-11.)

SUMMARY OF THE ARGUMENT

The Court should affirm the dismissal of Puttuck's complaint because it does not state a claim under Utah law. Contrary to Puttuck's assertion, the Gendrons never asserted any counterclaims against Puttuck, which is fatal to his wrongful use of civil proceedings and abuse of process claims. Moreover, Utah does not recognize civil claims for perjury or obstruction of justice. Additionally, Puttuck did not plead the Gendrons had a meeting of the minds to accomplish an unlawful act, which is necessary to state a claim for civil conspiracy. Finally, even if Puttuck had sufficiently pleaded his claims, they would be barred by the statute of limitations.

Further, the Court did not abuse its discretion denying Puttuck's request to amend his complaint because he did not submit a proposed amended complaint or a memorandum explaining what he would amend and why amendment was necessary. Absent such, there was no basis for an amendment.

ARGUMENT

I. PUTTUCK'S COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF.

None of Puttuck's five claims provide a basis for liability.

A. Wrongful Use of Civil Proceedings and Abuse of Process

Puttuck asserts claims against the Gendrons for wrongful use of civil proceedings and abuse of process. Wrongful use of civil proceedings is "the civil counterpart to malicious prosecution" and occurs when a party "institute[es] or maintain[s] civil proceedings for an improper purpose and without a justifiable basis." *Gilbert v. Ince*,

1999 UT 65,¶ 19, 981 P.2d 841 (citing RESTATEMENT (SECOND) OF TORTS § 682 (1997)) (additional citations omitted). Abuse of process occurs where a party "uses a legal process . . . against another primarily to accomplish a purpose for which it is not designed." *Id.* at ¶ 17 (quoting RESTATEMENT (SECOND) OF TORTS § 682 (1997)) (alteration in original, additional citations omitted).

Puttuck's wrongful use of civil proceedings and abuse of process claims are based entirely on his assertion that the Gendrons wrongfully filed and pursued counterclaims against him in *Puttuck I*. (Add. at 5-6 & 9-10.) There are no other allegations of wrongdoing. The only counterclaimant in *Puttuck I*, however, was LRG, Inc. (Add. at 49-66.) The Gendrons did not assert any counterclaims. Therefore, there is no factual basis for these claims and the trial court properly dismissed them.

Nevertheless, assuming the Gendrons had asserted counterclaims in *Puttuck I*, Puttuck's claims for wrongful use of civil proceedings and abuse of process in this case would still be barred. Any assertion that the fictional counterclaims were without merit would have been required to have been asserted in that case and would have been extinguished by the settlement and dismissal with prejudice of *Puttuck I*.

B. Civil Perjury and Obstruction of Justice

Puttuck asserts claims against the Gendrons for civil perjury and obstruction of justice. This Court held in *Cline II v. State of Utah*, 2005 UT App 498, ¶ 29, 142 P.3d 127, that Utah law does not recognize either as a claim for relief. The plaintiff in *Cline II* asserted civil claims against the Division of Child and Family Services and a child

welfare worker for perjury and obstruction of justice relating to the caseworker's investigation of parental abuse allegations. The trial court granted the motion to dismiss these claims. This Court affirmed, explaining, "When a statute makes certain acts unlawful and provides criminal penalties for such acts, but does not specifically provide for a private right of action, we generally will not create such a private right of action." *Id.* (additional citations omitted). The Court continued, "The Utah Code provides criminal penalties for . . . obstruction of justice, and perjury, but does not provide for a private right of action for any of those acts." *Id.*

Utah law has not created a civil claim for relief for perjury or obstruction of justice since *Cline II* was decided. Accordingly, Utah law does not recognize either, making dismissal of these claims appropriate.

C. Civil Conspiracy

Puttuck's civil conspiracy claim is based on allegations that Peter Gendron testified falsely during his deposition in *Puttuck I* and *Hale* and that William Gendron "failed and refused to disavow or reject this false testimony after having multiple opportunities to do so . . . ." (Add. at 3-4, 10.)

To assert a claim for civil conspiracy, a plaintiff must plead "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof." *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶ 22-23, 54 P.3d 1054 (internal quotation marks and additional citations omitted).

There is no assertion William knew Peter's testimony was false or that the two of them planned for Peter to testify falsely. Therefore, Puttuck failed to plead an essential element of civil conspiracy.

In *Waddoups*, the Utah Supreme Court affirmed summary judgment on a civil conspiracy claim where the plaintiffs failed to produce evidence supporting their claim. *Id.* at ¶¶ 35-36. *See also*, *Turville v. J&J Properties, L.C.*, 2006 UT App 305, ¶ 26, 145 P.3d 1146 (trial court properly dismissed civil conspiracy claim based on plaintiff's failure to plead fraud supporting the claim with particularity). Puttuck, did not even properly plead a civil conspiracy claim. Therefore, the district court properly dismissed it.

D. Statute of Limitations

Even if Puttuck's complaint had properly stated a claim for relief, each would be barred by the four-year statute of limitations set forth in Utah Code Ann. § 78-12-25(3). Puttuck's claims are all founded on ¶ 19 of his complaint, which alleges:

> PETER testified that the $500,000 loss asserted in [] counterclaims were due to [Puttuck's] negligence and mismanagement etc. [sic] Likewise, under oath on other occasions, Defendant PETER testified that [he and others] suffered this very same loss due to Hale['s] . . . negligence and mismanagement, etc. . . . and . . . substantially covered the same time frame.

(Add. at 4.) The first testimony referred to in ¶ 19 occurred on February 23, 2000 during Peter's deposition in *Puttuck I*. (Add. at 121.) The "other occasions" both occurred in *Hale*: first in Peter's deposition on November 3, 2003 and later at trial in June 2006.

(Add. at 108-109.) Puttuck did not file his complaint until March 12, 2007. (Add. at 1-12.)

"'[A] cause of action accrues' and the 'statutes of limitations begin running upon the happening of the last event necessary to complete the cause of action.'" *Russell/Packard Development, Inc. v. Carson*, 2003 UT App 316, ¶12, 78 P.3d 616 (quoting *Spears v. Warr*, 2002 UT 24, ¶33, 44 P.3d 742). Using the *Puttuck I* deposition date, Puttuck's claims clearly fall outside the statute of limitations. Therefore, he argued in response to the motion to dismiss that "[i]t was only at the trial in June 2006 . . . that [Puttuck] knew Peter Gendron had testified falsely in February 2000." (Add. at 109.)

"'[W]hen a plaintiff alleges that a defendant took affirmative steps to conceal the plaintiff's cause of action" . . . the concealment prong of the discovery rule applies to toll the statute of limitations on the plaintiff's claims, regardless of inquiry or constructive notice. *Russell/Packard Development, Inc.*, 2003 UT App 316, ¶ 15 (quoting *Berenda v. Langford*, 914 P.2d 45 (Utah 1996) and citing *Seale v. Gowans*, 923 P.2d 1361, 1365 (Utah 1996)). "'[T]he discovery rule has no application' [] where the plaintiff 'd[id] not suggest any reason why the action could not have been filed' . . . when the statute of limitations expired on his claim." *Id.* (quoting *Atwood v. Sturm, Ruger & Co.*, 823 P.2d 1064, 1065 (Utah 1992)). "[I]n cases *not involving allegations of concealment*, inquiry notice on the part of the plaintiff is enough to trigger the running of the limitations period." *Id.* (citing *Berenda v. Langford*, 914 P.2d 45, 51-52 (Utah 1996)) (emphasis in original).

Puttuck failed to plead any facts establishing the discovery rule applied to toll the statute of limitations. As held in *Atwood* and confirmed in *Russell/Packard*, failure to do so renders the discovery rule inapplicable. Consequently, Puttuck was on inquiry notice of the allegedly false testimony in *Puttuck I* and the statute of limitations began to run on February 23, 2000. Accordingly, his complaint, filed more than seven years later, is time-barred, even if it had properly set forth a claim for relief.

II. THE COURT DID NOT ABUSE ITS DISCRETION BY DENYING PUTTUCK'S REQUEST TO AMEND HIS COMPLAINT.

Rule 15 of the Utah Rules of Civil Procedure governs amended pleadings. It states that after a responsive pleading is served, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Utah R. Civ. P. 15(a). "To properly move for leave to amend a complaint, a litigant must file a motion that 'shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" *Holmes Development, LLC v. Cook*, 2002 UT 38, ¶ 57, 48 P.3d 895 (quoting Utah R. Civ. P. 7(b)(1)) (additional citations omitted). A motion for leave to amend "*must* be accompanied by a memorandum of points and authorities in support and by a proposed amended complaint."[1] *Id.* (emphasis added, internal and additional citations omitted).

This requirement is supported by sound public policy, including:

(1) mitigating prejudice to opposing parties by allowing that party to

[1] The internal citation was to Rule 4-501(1)(A) of the Utah Rules of Judicial Administration, in effect when *Holmes* was decided. It was subsequently replaced by Rule 7(c) of the Utah Rules of Civil Procedure, which also requires a written memorandum to accompany "[a]ll motions, except uncontested or ex parte motions . . . ."

> respond to the motion for leave to amend, and (2) assuring that a court can be apprised of the basis of a motion and rule upon it with a proper understanding of the motion.

Holmes Development, LLC v. Cook, 2002 UT 38, ¶ 39 (additional citation omitted). It further enables the trial court to "ascertain what changes are sought and . . . whether justice so requires the amendment of a pleading." *Id.* (additional citation omitted).

Puttuck did not file a motion to amend, a supporting memorandum or a proposed amended complaint. His request to amend consisted of one sentence at the end of his opposition to the Gendrons' motion to dismiss, which read, "PLAINTIFFS [sic] REQUEST TO AMEND COMPLAINT if the Court finds the need for more information regarding the claims asserted." (Add. at 118.)

The Utah Supreme Court ruled in *Holmes* that the trial court properly refused a similar request to amend. Responding to a motion for summary judgment, Holmes argued:

> "In the event this Court determines that Holmes' Complaint fails to adequately plead the claims and causes of action addressed above, Holmes moves this Court for leave to amend its Complaint pursuant to Rule 15 of the Utah Rules of Civil Procedure. Case law interpreting Rule 15 recognizes that the rules of Civil Procedure liberalize pleading requirements and require that the parties be afforded the privilege of presenting whatever legitimate contentions they may have pertaining to the dispute. Rule 15 further requires that leave to amend "shall be freely given when justice so requires."

Holmes Development, LLC v. Cook, 2002 UT 38, ¶ 38 (internal citation omitted). Affirming the dismissal, the Court explained, "Holmes's abbreviated requests for leave to amend its complaint 'lacking . . . statement[s] of the grounds for amendment and dangling

at the end of [its] memorand[a, do] not rise to the level of a motion for leave to amend.'" *Id.* at ¶ 40 (quoting *Calderon v. Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir.1999)) (alterations in original). The court therefore concluded that the trial judge did not abuse his discretion in denying the request.

Similarly, Puttuck's abbreviated request appeared only in passing at the end of his memorandum opposing a dispositive motion, did not state with particularity the basis for the proposed amendment and did not identify what it would be. In short, there was nothing that provided the district court with any basis to conclude that justice required amendment. Accordingly, the trial court judge did not abuse his discretion in denying the request to amend.

III. THE GENDRONS ARE ENTITLED TO THEIR COSTS IN RESPONDING TO THIS APPEAL.

Rule 34 of the Utah Rules of Appellate Procedure states, "[I]f a judgment or order is affirmed, costs *shall* be taxed against appellant unless otherwise ordered . . . ." Rule 34(a), Utah R. App. P. (emphasis added). Because the order of dismissal should be affirmed in its entirety, the Gendrons are entitled to recover their costs and request that the Court enter an order awarding those, the amount to be determined by the trial court in accordance with Rule 34.

CONCLUSION

For the reasons set forth above, the Gendrons respectfully request that the Court affirm the dismissal of Puttuck's complaint and award them their costs incurred in defending against this appeal.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 29 of the Utah Rules of Appellate Procedure, the Gendrons respectfully request that the Court conduct oral argument.

DATED this 29TH day of February, 2008.

SNOW, CHRISTENSEN & MARTINEAU

Harold G. Christensen
Heather S. White
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of February, 2008, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEES** to be served, ***via U.S. Mail, postage prepaid,*** on the following:

Mr. John F. Fay
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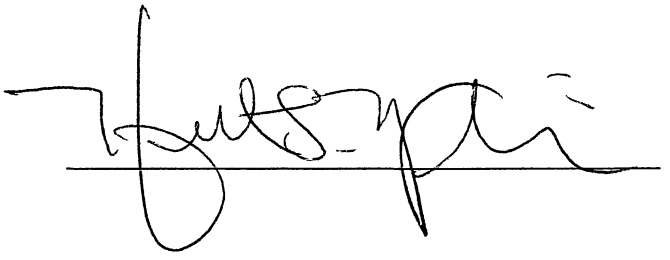
Lehi, Utah 84043

Attorneys for Appellants



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